

A **FRANCIS JOSEPH PUTHUCHEARY v. ENG SECURITIES
SDN BHD**

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA

B VERNON ONG LAM KIAT JCA
[CIVIL APPEAL NO: J-02(IM)-2731-12-2013]
24 APRIL 2015

C **CIVIL PROCEDURE:** *Striking out – Notice of assessment of damages – Appeal against – Case management proceedings – Appellant successfully obtained judgment to establish liability against respondent – Assessment of damages to be addressed – Whether appellant had not complied with and defied directions of Deputy Registrar – Whether appellant demonstrated consistent effort to obtain required documents – Whether there was abuse of court process – Whether appellant deprived of resultant benefit of successful conclusion of claim – Whether judge erred in apprehending material facts – Whether appellate intervention warranted*

D **CIVIL PROCEDURE:** *Striking out – Notice of assessment of damages – Appeal against – Res judicata – Applicability – Whether res judicata permitted to bar claim from being relitigated in subsequent action – Determination of facts of each case – Whether application of doctrine of res judicata would lead to unjust result*

E The two appeals herein arose from two High Court decisions relating to the same civil suit in connection with (i) an appeal to a Judge-In-Chambers against the Deputy Registrar's order to strike out a notice of assessment of damages (the notice of assessment) on 9 July 2013 (the subject matter of the first appeal); and (ii) an appeal to a Judge-In-Chambers against the decision of the Deputy Registrar on 6 February 2014 to set aside the abovesaid order (the subject matter of the second appeal). The background facts to these appeals disclosed that on 27 January 2011, the High Court had allowed the appellant's claim against the respondent who was found to be vicariously liable for the actions of the second defendant, the appellant's remisier who had absconded. In allowing the claim, the High Court had ordered that damages be assessed by the Registrar. On 4 July 2011, the appellant filed the notice of assessment and subsequently, the assessment for damages proceedings went through a series of case managements before the Deputy Registrar beginning with the first such proceedings on 16 August 2011 and finally on 9 July 2013, when the notice of assessment was ordered to be struck out by the Deputy Registrar. The appellant appealed against the order of the Deputy Registrar, which was dismissed by the judge. Hence, the first appeal herein. The appellant had also filed a notice of application to a Judge-In-Chambers on 29 July 2013 to set aside the said striking out order. The High Court Judge, in dismissing the appellant's appeal, had also ordered the notice of application to be heard by the Deputy Registrar. On 6 February 2014, the Deputy Registrar allowed the appellant's application to set aside

her order dated 9 July 2013 and reinstated the appellant's notice of assessment. The respondent thereupon appealed against the decision of the Deputy Registrar and subsequently, the High Court Judge allowed the appeal. The appellant thus appealed against the said decision, hence, the second appeal. As regards the first appeal, the decision of the High Court Judge in dismissing the appellant's appeal, in essence, was grounded on the appellant's repeated non-compliance with and defiance of the directions of the Deputy Registrar. In the second appeal, the High Court Judge pointed out that the same issues of repeated non-compliance with court's directions were raised and accordingly the issue of the Deputy Registrar's correctness of her earlier decision to strike out the notice of assessment was *res judicata* as the High Court had earlier decided that she was correct in so deciding. The issue that arose was whether the judge had taken into account irrelevant or incorrect facts or had otherwise misconceived the facts with the concomitant effect that His Lordship had failed to take into account relevant or correct facts.

Held (allowing the appeals)

Per Idrus Harun JCA delivering the judgment of the court:

- (1) The bundle of documents which the appellant had failed to file were related to certain documents from Bursa Malaysia which the appellant had not been able to obtain before 9 July 2013. The record of the proceedings of the case management on 31 July 2013 disclosed that these documents were finally obtained on 26 July 2013, after the Deputy Registrar had struck out the notice of assessment. The appellant had complied with the other directions of the Deputy Registrar, and these documents were sufficient for the disposal of the appellant's application and the failure to file further documents would only be to his own detriment. His Lordship ought not to have dismissed both appeals but should have instead ordered the case to be set down for hearing based on the documents before the court at the very least. The fact that the appellant finally obtained the documents from Bursa Malaysia clearly demonstrated his consistent effort to obtain these documents and effectively dispelled any notion that he had deliberately disobeyed the court's directions or delayed the proceedings or abused the court process. (paras 21 & 22)
- (2) The judge in both appeals did not take into account the fact that liability had already been conclusively found and established against the respondent by the High Court and affirmed by this court. All that remained to be addressed in this long standing dispute was the assessment of damages. The appellant had sought and successfully obtained the judgment but was of no avail as he was deprived of the resultant benefit of enjoying the fruits of the successful conclusion of his claim. (para 24)

- A (3) It was the judge who amended the appellant's notice of application to set
B aside the Deputy Registrar's striking out order and accordingly ordered
C the said application to be heard before the Deputy Registrar. If the issues
D ventilated before the judge in respect of the appeal against the said
E striking out order could not be re-litigated in the present instance, what
then would the appellant be expected to argue before the Deputy
Registrar. When the High Court Judge ordered the Deputy Registrar to
hear the application, the issue of non-compliance with the directions
given by the Deputy Registrar would inevitably be canvassed once
again. The application had to be considered on the merits. Whether *res*
judicata should be permitted to bar a claim from being relitigated in a
subsequent action is a matter which is to be determined on the facts of
each case, always having regard to where the justice of the individual
and particular case lies. Hence, the present case came within the
dimension of *Scotch Leasing* that the application of the doctrine of *res*
judicata would lead to an unjust result. (paras 27 & 29)
- (4) The judge had erred in misapprehending the material facts by taking into
account events and facts which were patently false. This represented a
necessary occasion warranting appellate intervention of this court in the
findings made by the judge. Thus, this court came to the ineluctable
conclusion that the decisions of the High Court Judge should be set
aside. (para 30)

Bahasa Malaysia Translation Of Headnotes

- Kedua-dua rayuan ini timbul daripada dua keputusan Mahkamah Tinggi
yang berkaitan dengan saman sivil yang sama berhubungan (i) rayuan kepada
F Hakim-Dalam-Kamar terhadap perintah Timbalan Pendaftar untuk
membatalkan satu notis taksiran ganti rugi (notis taksiran) pada 9 Julai 2013
(hal perkara rayuan pertama); dan (ii) rayuan kepada Hakim-Dalam-Kamar
terhadap keputusan Timbalan Pendaftar pada 6 Februari 2014 untuk
mengenenpikan perintah yang dinyatakan di atas (hal perkara rayuan kedua).
- G Latar belakang fakta rayuan-rayuan ini menunjukkan bahawa pada
27 Januari 2011, Mahkamah Tinggi telah membenarkan tuntutan perayu
terhadap responden yang didapati bertanggungjawab secara vikarius bagi
tindakan-tindakan defendan kedua, remiser perayu yang telah melarikan diri.
Dalam membenarkan tuntutan tersebut, Mahkamah Tinggi telah
H memerintahkan agar ganti rugi ditaksirkan oleh Pendaftar. Pada 4 Julai 2011,
perayu memfailkan notis taksiran dan seterusnya, prosiding taksiran ganti
rugi telah melalui satu siri pengurusan kes di hadapan Timbalan Pendaftar
bermula dengan prosiding pertama pada 16 Ogos 2011 dan berakhir pada
9 Julai 2013, apabila notis taksiran dibatalkan mengikut perintah Timbalan
Pendaftar. Perayu merayu terhadap perintah Timbalan Pendaftar, yang
I ditolak oleh Hakim. Oleh itu, rayuan pertama ini. Perayu telah memfailkan
notis permohonan kepada Hakim Dalam Kamar pada 29 Julai 2013 untuk
mengenenpikan perintah pembatalan. Hakim Mahkamah Tinggi, dalam

menolak rayuan perayu, telah juga memerintahkan notis permohonan didengar oleh Timbalan Pendaftar. Pada 6 Februari 2014, Timbalan Pendaftar membenarkan permohonan perayu untuk mengenenpikan perintahnya bertarikh 9 Julai 2013 dan menghidupkan semula notis taksiran perayu. Responden merayu terhadap keputusan Timbalan Pendaftar dan selepas itu, Hakim Mahkamah Tinggi membenarkan rayuan. Perayu dengan itu merayu terhadap keputusan tersebut dan oleh itu rayuan kedua. Berkenaan rayuan pertama, keputusan Hakim Mahkamah Tinggi dalam menolak rayuan perayu, pada dasarnya, adalah berasaskan ketidakpatuhan perayu dan pembantahan arahan Timbalan Pendaftar. Dalam rayuan kedua, Mahkamah Tinggi menyatakan bahawa isu yang sama berkenaan ketidakpatuhan arahan mahkamah dibangkitkan dan sewajarnya isu pembetulan keputusan Timbalan Pendaftar sebelum ini untuk membatalkan notis taksiran adalah *res judicata* kerana Mahkamah Tinggi telah sebelum ini memutuskan bahawa beliau betul dalam penentuan itu. Isu yang timbul adalah sama ada hakim telah mengambil kira fakta-fakta tidak relevan atau tidak betul atau sebaliknya telah salah anggap fakta dengan kesan yang seiring bahawa Yang Arif telah gagal mengambil kira fakta-fakta yang relevan atau betul.

Diputuskan (membenarkan rayuan-rayuan)

Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

- (1) Perayu telah gagal memfailkan ikatan dokumen yang mempunyai kaitan dengan beberapa dokumen daripada Bursa Malaysia yang perayu gagal perolehi sebelum 9 Julai 2013. Rekod prosiding pengurusan kes pada 31 Julai 2013 mendedahkan bahawa dokumen-dokumen ini telah akhirnya diperolehi pada 26 Julai 2013, selepas Timbalan Pendaftar telah membatalkan notis taksiran itu. Perayu telah mematuhi dengan arahan-arahan Timbalan Pendaftar yang lain, dan dokumen-dokumen ini adalah memadai untuk pelupusan permohonan perayu dan kegagalan memfailkan dokumen-dokumen selanjutnya hanya akan merugikan dirinya sendiri. Yang Arif Hakim tidak sepatutnya menolak kedua-dua rayuan tetapi sepatutnya memerintahkan supaya kes ditetapkan untuk perbicaraan berdasarkan dokumen-dokumen sekurang-kurangnya di hadapan mahkamah. Fakta bahawa perayu telah akhirnya memperolehi dokumen-dokumen daripada Bursa Malaysia dengan jelasnya menunjukkan usahanya yang konsisten untuk memperolehi dokumen-dokumen itu dan secara berkesan turut menghapuskan apa-apa tanggapan bahawa perayu telah dengan sengaja tidak mengikut arahan mahkamah atau melambatkan prosiding atau menyalahgunakan proses mahkamah.
- (2) Hakim dalam kedua-dua rayuan tersebut tidak mengambil kira fakta bahawa liabiliti telah secara pasti didapati dan dibuktikan terhadap responden oleh Mahkamah Tinggi dan disahkan oleh mahkamah ini. Apa yang masih perlu ditangani dalam pertikaian ini adalah taksiran

- A ganti rugi. Perayu telah memohon dan telah berjaya memperoleh penghakiman tetapi ia sia-sia sahaja kerana telah dinafikan manfaat menikmati kejayaan tuntutannya.
- (3) Hakim yang telah meminda notis permohonan perayu untuk mengenyepikan perintah pembatalan Timbalan Pendaftar dan sewajarnya mengarahkan permohonan tersebut didengar di hadapan Timbalan Pendaftar. Jika isu-isu yang dibentangkan di hadapan Hakim berkenaan rayuan terhadap perintah pembatalan tersebut tidak boleh dibentangkan sekali lagi dalam hal ini, apa yang dijangka akan diujahkan oleh perayu di hadapan Timbalan Pendaftar. Apabila Hakim Mahkamah Tinggi membuat perintah supaya Timbalan Pendaftar mendengar permohonan itu, isu ketidakpatuhan dengan arahan-arahan yang diberi oleh Timbalan Pendaftar akan dikemukakan sekali lagi. Permohonan harus dipertimbangkan atas merit. Sama ada *res judicata* harus dibenarkan untuk menghalang tuntutan daripada dibuat litigasi sekali lagi dalam tindakan seterusnya adalah perkara yang perlu diputuskan atas fakta setiap kes, dengan sentiasa mengambil kira di mana keadilan individu dan kes tertentu terletak. Oleh itu, kes ini terangkum dalam dimensi *Scotch Leasing* bahawa penggunaan doktrin *res judicata* akan membawa kepada keputusan yang tidak adil.
- D
- E (4) Hakim telah terkhilaf dalam memahami fakta material dengan mengambil kira kejadian dan fakta yang secara terangnya adalah palsu. Ini merupakan satu peristiwa yang memerlukan campur tangan rayuan mahkamah ini dalam dapatan yang dibuat oleh Hakim. Oleh itu, mahkamah ini mencapai kesimpulan yang tidak dapat dihindari bahawa keputusan-keputusan Hakim Mahkamah Tinggi harus diketepikan.
- F

Case(s) referred to:

Allen v. Sir Alfred Mc Alpine & Sons Ltd [1968] 2 QB 229 (*refd*)

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA (*refd*)

Evans v. Bartlam [1937] 2 All ER 646 (*refd*)

Public Finance Bhd v. Natcom Development Sdn Bhd & Ors [1996] 4 CLJ 291 FC (*refd*)

G *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630 (*refd*)

Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC (*refd*)

Legislation referred to:

Rules of Court 2012, O. 34 r. 2(3), (4)

H For the appellant - DP Naban (K Gobinath & Josiah Lim with him); M/s Kadir Andri & Partners

For the respondent - Balvinder Singh Kenth; M/s Nur Zalika Mohd Asri Redha

[Editor's note: For the High Court judgment, please see Francis Joseph Puthucheary v. Eng Securities Sdn Bhd & Anor [2011] 1 LNS 732.]

I

Reported by Suhainah Wahiduddin

JUDGMENT**A****Idrus Harun JCA:****Introduction**

[1] We heard both Civil Appeal No: J-02(IM)-2731-12/2013 (the first appeal) and Civil Appeal No. J-02(IM)-1179-07/2013 (the second appeal) together as the parties thereto were the same and it involved a common core of facts.

B

[2] The appeals arose from two High Court decisions relating to the same civil suit Guaman No. 22-579-2000. These two decisions were in connection with:

C

- (a) an appeal to a judge-in-chambers against the Deputy Registrar's order to strike out a notice of assessment of damages (the notice of assessment) on 9 July 2013 (the subject matter of the first appeal); and
- (b) an appeal to a judge-in-chambers against the decision of the Deputy Registrar on 6 February 2014 to set aside the abovesaid order (the subject matter of the second appeal).

D

[3] After hearing both counsel for the appellant and the respondent, we accordingly, at the conclusion of the arguments, allowed the appeals. In view of the above and for expediency, we propose to dispose of both appeals in, and deliver, one common judgment.

E**Background Of Case**

[4] Briefly stated, and before we go more closely into the reasons for allowing the appeals, the background facts to these appeals disclose that on 27 January 2011, the High Court allowed the appellant's claim against the respondent who was found to be vicariously liable for the actions of the second defendant, the appellant's remisier who had absconded. The High Court, in allowing the claim, had also ordered that damages be assessed by the Registrar.

F**G**

[5] On 4 July 2011, the appellant filed the notice of assessment. The respondent in turn, applied for a stay of the assessment proceedings. However, on 8 May 2012 the said stay application was dismissed by the High Court.

H

[6] Subsequently, the assessment for damages proceedings went through a series of case managements before the Deputy Registrar beginning with the first such proceedings on 16 August 2011 and finally on 9 July 2013, when the notice of assessment was ordered to be struck out by the Deputy Registrar.

I

[7] The appellant appealed against the order of the Deputy Registrar and on 11 November 2013 the appeal was dismissed by the learned judge. Hence, the first appeal herein.

- A [8] Besides appealing against the order to strike out the notice of assessment, the appellant had also filed a notice of application to a judge in chambers on 29 July 2013 to set aside the said striking out order. The learned High Court Judge, in dismissing the appellant's appeal on 11 November 2013, had also ordered the notice of application to be heard by the Deputy Registrar. However, since the notice of application was for hearing before the judge in chambers, the learned High Court Judge allowed the appellant to amend the same so that it could be heard before the Deputy Registrar. On 6 February 2014, the Deputy Registrar allowed the appellant's application to set aside her order dated 9 July 2013 and reinstated the appellant's notice of assessment.
- B
- C [9] The respondent thereupon appealed against the decision of the Deputy Registrar and on 9 June 2014 the learned High Court Judge allowed the appeal. The appellant appealed against the said decision to this court (the second appeal).
- D [10] As regards the first appeal, the decision of the learned High Court Judge in dismissing the appellant's appeal, in essence, is grounded on the appellant's repeated non-compliance with and defiance of the directions of the Deputy Registrar.
- E [11] In the second appeal, the learned judge pointed out that the same issues of repeated non-compliance with court's directions were raised and accordingly the issue of the Deputy Registrar's correctness of her earlier decision to strike out the notice of assessment was *res judicata* as the High Court had earlier decided that she was correct in so deciding. The learned judge additionally held that there were no materials placed before the Deputy Registrar that could explain why the appellant failed to comply with the directions and that accordingly, the Deputy Registrar's exercise of her discretion in favour of the appellant pursuant to O. 34 r. 2(4) of the Rules of Court 2012 was without any basis.
- F
- G [12] Before proceeding further, it is pertinent to note at this point that the record of the case management proceedings dated 12 June 2012 revealed that the parties were to use the trial bundle of documents for the hearing of the notice of assessment. In fact, the learned judge noted in His Lordship's judgment in respect of the first appeal that during the case management on 22 January 2013, the appellant had informed the Deputy Registrar that he intended to rely on the earlier bundle of documents used during the trial and would file additional bundle of documents for the assessment of damages proceedings.
- H
- I [13] At the next case management on 7 February 2013, the Deputy Registrar was informed that the appellant was still waiting for documents from Bursa Saham. The parties were in consequence of that, directed to file new bundle of documents and witness statements. The appellant was also directed to file the summary of case for assessment of damages while the respondent was required to file a reply thereto.

[14] The material facts gleaned from the records of appeal also disclosed that at the next case management on 3 July 2013, counsel for the appellant once again informed the Deputy Registrar that the appellant could not prepare the bundle of documents as he was yet to receive the information from Bursa Malaysia. It was during the case management in question that according to the learned judge, the Deputy Registrar had ordered that “failure to comply with the directions given on 7 February 2013 by 9 July 2013 would result in the assessment being struck out”.

[15] Thus, on 9 July 2013 at the upcoming case management, upon being informed that the appellant had not filed the bundle of documents, the Deputy Registrar struck out the appellant’s action for the assessment of damages, presumably pursuant to O. 34 r. 2(3) of the Rules of Court 2012. This, the Deputy Registrar did, despite being informed by the appellant’s counsel that he would be referring to the bundle of documents used during the full trial of the case, the case summary and draft witness statements had been filed and that the parties had agreed to rely on the bundle of documents as recorded during the case management on 12 June 2012.

[16] The appellant’s submissions in both appeals in our view, may be condensed to the issue of whether the learned judge had taken into account irrelevant or incorrect facts or had otherwise misconceived the facts with the concomitant effect that His Lordship had failed to take into account relevant or correct facts.

Finding

[17] Our reading of the learned judge’s brief judgment of the first appeal explicitly showed that His Lordship had arrived at the conclusion by recounting the events leading up to the appeal before His Lordship. In particular, His Lordship held:

(vii) 3.7.2013 the plaintiff again through a pupil in chambers informed the Deputy Registrar that he had yet to obtain the documents from Bursa Malaysia. The Deputy Registrar asked the pupil in chamber to explain the plaintiff’s non-compliance with the earlier directions but none was forthcoming. The Deputy Registrar then made the following orders:

- (a) Final case management on 7.2.2013.
- (b) Plaintiff to serve his documents on the 1st Defendant by 5.7.2013.
- (c) 1st defendant to revert with their documents by 8.7.2013.
- (d) The bundle of documents to be filed by 9.7.2013.
- (e) Failure to comply with the directions given on 7.2.2013 by 9.7.2013 would result in the assessment being struck out.

[18] In the latter part of the judgment, His Lordship had once again reiterated that the appellant continued to defy the directions even though the Deputy Registrar warned him on 3 July 2013 that the assessment would be struck out if he continued to do so.

A [19] For the appellant, it was contended that the learned judge had taken into account events and facts which were plainly not true and had misconceived the facts leading to the striking out of the notice of assessment. Taking the argument further, learned counsel submitted that based on the finding that the Deputy Registrar had suffixed the directions to the appellant with a warning that the appellant's application would be struck out if he failed to comply, the learned judge eventually dismissed the appellant's appeal. We perused the record of appeal quite certain in mind that what it would reveal would confirm that such ultimatum was in fact given. However as it turned out, the record of appeal did not show that the Deputy Registrar during the case management on 7 February 2013 and 3 July 2013 had imposed on the appellant any such ultimatum.

D [20] The fact that could be discerned from the record of appeal was that on 7 February 2013, the Deputy Registrar had given directions to file written witness statements, a summary of the assessment of damages along with the bundle of documents. These directions were reiterated at the case management on 3 July 2013. The appellant had, on 9 July 2013, submitted these documents save the bundle of documents. Mindful of the fact that on 12 June 2012 during the case management, the parties had agreed to rely on the trial bundle of documents and the learned judge had also acknowledged that on 22 January 2013 the appellant had informed the Deputy Registrar that he intended to rely on the earlier bundle of documents used during the trial and would file additional bundle of documents for the assessment proceeding, we could safely assume that this understanding was within the knowledge of the parties and the Deputy Registrar.

F [21] Thus, taking this fact into account, we could only hazard a guess that the bundle of documents which the appellant failed to file were related to certain documents from Bursa Malaysia which the appellant had not been able to obtain before 9 July 2013. We pause to observe at this point that the information that we gleaned from the record of the proceedings of the case management on 31 July 2013 disclosed that these documents were finally obtained on 26 July 2013, after the Deputy Registrar had struck out the notice of assessment. It is thus clear that the appellant had complied with the other directions of the Deputy Registrar, and these documents were sufficient for the disposal of the appellant's application and the failure to file further documents, as rightly contended by the appellant's counsel, would only be to his own detriment. With respect, His Lordship ought not to have dismissed both appeals but should have instead ordered the case to be set down for hearing based on the documents before the court at the very least.

I [22] The fact that the appellant finally obtained the documents from Bursa Malaysia clearly demonstrated his consistent effort to obtain these documents and effectively dispelled any notion that he had deliberately disobeyed the court's directions or delayed the proceedings or abused the court process as was contended by learned counsel for the respondent. In *Allen v. Sir Alfred Mc Alpine & Sons Ltd* [1968] 2 QB 229, Diplock LJ said:

What then are the principles which the court should apply in exercising its discretion to dismiss an action for want of prosecution upon a defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue.

[23] Similarly, in *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630 the Court of Appeal held:

The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But, if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

[24] Quite clearly though, the learned judge in both appeals, did not take into account the fact that liability had already been conclusively found and established against the respondent by the High Court and affirmed by this court earlier. All that remained to be addressed in this long standing dispute was the assessment of damages. It would be most inappropriate under the circumstances of the case for the learned judge to allow both appeals as this would allow the matter to be further protracted. The appellant had sought and successfully obtained the judgment but was of no avail as he was deprived of the resultant benefit of enjoying the fruits of the successful conclusion of his claim. We think the decision of the Court of Appeal delivered by Gopal Sri Ram JCA in the case of *Public Finance Bhd v. Natcom Development Sdn Bhd & Ors* [1996] 4 CLJ 291; [1996] 2 MLJ 657 would serve as a useful guide on the exercise of the court's discretion during the pre-trial case management when His Lordship held:

Order 34 r. 8 is a wholesome provision which provides an effective machinery for the disposal of cases long languishing in our courts. When properly used, it has the beneficial effect of clearing the courts of the unnecessary backlog with which they are burdened. When used without due care and caution, it will perpetuate the very delay which it is intended to cure.

Take this very case. Had the learned judicial commissioner decided to try the action rather than summarily dismissing it as he did, the case would have been finally disposed of in a few months. Any appeal to the Court of Appeal would likewise have been heard and determined not long thereafter. A further appeal, if any, to this court would also have been dealt with.

- A As it happens, the action, after a delay of some two years, has now to be remitted to the learned judicial commissioner for trial. Had the action not been summarily dismissed, all the trial and appellate procedures – of which we spoke a moment ago – available to an unsuccessful litigant may well have been exhausted during this period of delay.
- B Judges or judicial commissioners of the High Court must hearken to the spirit and intendment of O. 34 r. 8, and only strike out those cases falling clearly within the principle we have enunciated earlier in this judgment. An overzealous application for the rule may prove counter-productive.
- C [25] We would like to emphasise at this stage that our finding of facts and the grounds relied on in arriving at such finding as well as rendition of the intended meaning of the law are applicable to both appeals. However, as regards the second appeal, it is important to recall the decision of the learned judge which we had dwelt upon earlier in our judgment. His Lordship's decision in allowing the second appeal in the main, turned on the critical issue of the doctrine of *res judicata* which according to the learned judge the matter could not be pursued further as the High Court had already decided that the Deputy Registrar was correct in deciding to strike out the notice of assessment.
- D [26] We should say in this regard that it is patently clear that the learned Deputy Registrar heard the notice of application pursuant to the order of the learned judge made on 11 November 2013. In fact, the learned Deputy Registrar would not have and in fact could not have heard the notice of application as it was made to the judge in chambers. Therefore, when the application was ordered to be heard before the Deputy Registrar, she obviously had to take into account all material evidence put before her in
- E allowing the application to set aside her initial striking out order as clearly demonstrated in her grounds of decision which according to learned counsel, amongst others were as follows:
- F (a) that the appellant's notice of assessment of damages was struck out on 9 July 2014 as the appellant did not file bundle of documents although he had complied with other directions;
- G (b) that the trial bundles of documents could not be located by the court;
- H (c) that the appellant should not be deprived of the fruits of judgment that he had obtained against the respondent after the trial and on the other hand the respondent did not suffer prejudice which could not be compensated by costs.
- I [27] Obviously the learned judge did not consider the grounds relied on by the Deputy Registrar in setting aside her own earlier order to strike out the notice of assessment. Contrary to the learned judge's finding and the contention of learned counsel for the respondent, these were indeed valid and cogent reasons justifying the Deputy Registrar's decision to set aside the earlier striking out order which she had made.

[28] The decision of the Deputy Registrar would not in our judgment attract the application of the principle of *res judicata*. While we are consciously aware that the doctrine of *res judicata* is not odious, the extension of the doctrine will undeniably accentuate further its importance in judicial determination of a cause of action. The essential point we would like to make here is that in law, there is a dimension to the doctrine of *res judicata* countenanced in the authorities which we ought to consider. Justice Gopal Sri Ram JCA in *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 described this dimension as follows:

Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is a respectable authority in support of the view I have just expressed.

In *Carl-Zeiss Stiftung v. Rayner and Keeler & Ors (No. 2)* [1966] 2 All ER 532 at p 573, Lord Upjohn said:

As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick's* case [1938] 4 All ER 747 at p 755; [1939] AC 1 at p 21). All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

[29] Thus, adopting the above principle, we shall consider whether justice of the present appeal demands that we should decline to apply the principle of *res judicata*. That brings us to the notice of application to start with. It may be recalled that it was the learned judge who amended the appellant's notice of application to set aside the Deputy Registrar's striking out order and accordingly ordered the said application to be heard before the Deputy Registrar. If the issues ventilated before the learned judge in respect of the appeal against the said striking order could not be reagitated in the present instance, what then the parties in particular the appellant would be expected to argue before the Deputy Registrar. If *res judicata* would operate to bar the appellant's application, the learned judge, with due respect to His Lordship, should have dismissed it instead of directing the Deputy Registrar to hear the application. After all, like the appeal before His Lordship, the appellant's application sought to set aside the striking out order of the Deputy Registrar. It would be obvious that when the learned High Court Judge ordered the Deputy Registrar to hear the application, the issue of non-compliance with the directions given by the Deputy Registrar would inevitably be canvassed

- A once again. The application had to be considered on the merits. Thus, mindful of the fact that whether *res judicata* should be permitted to bar a claim from being relitigated in a subsequent action, is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies, we are of the opinion that
- B the present case would neatly come within the *Scotch Leasing's* dimension that the application of the doctrine of *res judicata* would lead to an unjust result.

- [30] With much deference to the learned judge, we are satisfied that His Lordship, in allowing both appeals, had erred in misapprehending the material facts by taking into account events and facts which were patently false. This, in our view represents a necessary occasion warranting appellate intervention of this court in the finding made by the learned judge. It is indeed clear in the authorities that while the appellate court, in the exercise of its appellate power, is no doubt entirely justified in saying that initially
- C its function is one of review only and normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that, on other grounds such as misconception of facts or giving insufficient weight to relevant considerations or the decision will result in injustice being done, it has both the power and the duty to remedy it (see *Evans v. Bartlam* [1937] 2 All ER 646 and *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors* [1995] 3 CLJ 493; [1995] 2 MLJ 709).
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Conclusion

- [31] Premised on the aforesaid reasons, we come to the ineluctable conclusion that both appeals should be allowed and the decisions of the learned High Court Judge should be set aside. We, however, are of the view that the appellant was solely and completely responsible for causing the delay in hearing his own notice of assessment. He had undoubtedly caused the unnecessary and costly inconvenience to the respondent and in this regard, the appellant should not be awarded costs of these appeals. On the other
- F
- G hand, we think that this is an appropriate case to award costs to the respondent. In the upshot, we order the appellant to pay cost of RM10,000 to the respondent in the first appeal. As regards the second appeal, we make no order as to cost. Deposits shall be refunded to the appellant.

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